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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 352

GENERAL MOTORS CORPORATION; GENERAL MOTORS SALES CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court on demurrer to the indictment (R. 22–26; see also R. 66) is reported in 26 F. Supp. 353. The opinions of the circuit court of appeals (R. 4574–4634) are reported in 121 F. (2d) 376.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 1, 1941 (R. 4630), and petitions for

rehearing were denied July 2, 1941 (R. 4635). The petition for a writ of certiorari was filed August 6, 1941. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and as modified by Rule XI of the Rules of Practice and Procedure after verdict in Criminal Cases.

QUESTIONS PRESENTED

1. Whether a program by which a manufacturing corporation and its subsidiaries agree to subject dealers to coercive and discriminatory treatment for the purpose of forcing them to use an affiliated finance company, both for their wholesale purchases and retail sales, violates section 1 of the Sherman Antitrust Act.

2. Whether the trial court erred in excluding evidence (a) as to the soundness of the methods of financing of the subsidiary finance company as compared with those of other finance companies, and (b) that many dealers had not themselves been coerced.

STATUTE INVOLVED

Section 1 of the Sherman Antitrust Law, Act of July 2, 1890, 26 Stat. 209, 15 U. S. C., sec. 1:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *

STATEMENT

Petitioners are General Motors Corporation (hereinafter called G. M. C.), which manufactures automobiles, and three wholly owned subsidiaries, namely, General Motors Sales Corporation (hereinafter called G. M. S. C.), the selling agency for all General Motors automobiles, and General Motors Acceptance Corporation, and General Motors Acceptance Corporation of Indiana, Inc. (hereinafter together called G. M. A. C.), discount companies engaged in financing the wholesale purchase and retail sale of General Motors automobiles by dealers. With 19 individual officials of those companies, petitioners were indicted for having violated Section 1 of the Sherman Antitrust Law [1] (R. 2–16). Demurrers were overruled by two district judges (R. 22, 66).[2] The case was tried from October 9, 1939, to November 17, 1939. The jury returned a verdict of guilty against the corporate defendants and of not guilty against the individual defendants (R.

[1] Because no attack is now made on the sufficiency of the indictment as a pleading, it seems unnecessary to summarize its allegations.

[2] After overruling the demurrers, District Judge Slick disqualified himself from further participation in the case, and the case was assigned to District Judge Lindley (R. 27–28). At the request of the defendants he set aside Judge Slick's order overruling the demurrers, but then overruled them on his own account (R. 65–66).

1955). The facts, as disclosed by the testimony, may be summarized as follows:[3]

General Motors cars[4] are manufactured by G. M. C. in seven states. They are sold at the factory by G. M. C. to G. M. S. C. (R. 3739–3751). G. M. S. C. in turn sells them to approximately 15,000 automobile dealers situated in all of the states (R. 120, 141). The dealers are required to pay for the cars before shipment (R. 141). The dealers then sell the cars to retail purchasers.

The unit price for automobiles is high. In order to sell cars in large quantities, financing facilities are necessary both for dealers who purchase the cars at wholesale and for retail purchasers (R. 935). The petitioner G. M. A. C. and several hundred other companies are engaged in the business of supplying funds both to dealers and to the retail purchasers (R. 935).

Dealers purchasing cars at the factory must pay either by check or sight draft or establish credit arrangements with G. M. A. C. (R. 840, 841). If the services of other finance companies are used, such companies must advance the money necessary to pay for the cars at the time of shipment (R. 187, 920–921). In any event title or a property interest in the car passes to the dealer before shipment (R. 140, 141, 174, 175). Retail

[3] The evidence is summarized at greater length in the opinion of the Circuit Court of Appeals (R. 4581–4603).

[4] Chevrolet, Pontiac, Oldsmobile, Buick, La Salle, Cadillac.

purchasers desiring credit enter into conditional sales agreements with the dealers; the practice of the dealers is to assign these agreements to a finance company, in return for the face amount of the contract of sale exclusive of the finance charge (R. 855–856). Inasmuch as most dealers and retail purchasers are unable to pay outright for cars, the availability of financing facilities is essential to the movement in interstate commerce of by far the greater volume of General Motors cars (R. 882–885, 935; Gov't Ex. 22, R. 3119).

Dealers operate under contracts or franchises issued by G. M. S. C. These contracts may be cancelled on short notice and without cause (Gov't Exs. 13–14, R. 2769–2772, 2850). They specify that the dealer is under no circumstances to be considered the agent or legal representative of G. M. S. C. (Gov't Exs. 13–14, R. 2769, 2836), and the dealers are in fact separate economic units with their own invested capital (Gov't Ex. 14, R. 2891; R. 1370–1371). Each dealer is required to have a substantial investment in building, parts and accessories, and to have ample space and personnel (Gov't Ex. 14, R. 2885–2887). The dealers are required to make regularly written reports to G. M. S. C. and G. M. A. C. revealing the details of their operations (R. 249–252, 879, 881, 1397, 1638, 3881, 3883; Gov't Ex. 13, R. 2795; Gov't Ex. 116, R. 3879; Gov't Ex. 167, R. 3883).

G. M. A. C. was established in 1919 for the purpose of supplying credit facilities to purchasers of General Motors automobiles (R. 935). Its policy has differed from that of most other finance companies in that it requires dealers to guarantee by endorsement the retail paper assigned to it (Gov't Ex. 22, R. 3097; R. 940, 951). Partly for this reason, many dealers have preferred to use other finance companies (R. 873, 951–952). In 1925 the failure of the dealers to use G. M. A. C. began to disturb the General Motors executives, and in that year they initiated a program of "making every possible effort"[5] to induce dealers to use G. M. A. C. (R. 107, 108, 489, 504–506, 949, 961, 969, 996; Def.'s Ex. 49, R. 4181). This program has continued up until the time of the indictment in 1938 (R. 257–393, 398–485, 503–514, 522–730, 737–740, 743–777, 797–823, 875, 3916–4003). Between 1925, when the campaign began, and 1926 the total volume of G. M. A. C.'s business increased 225%, from $281,426,772 to $631,543,573 (Gov't Ex. 22, R. 3117); by 1937, 65% of the cars sold to dealers on time and 75% of retail sales on time were financed by G. M. A. C. (R. 4591–4592, 882–883).

The method primarily employed was to threaten to cancel the franchise of any dealer who refused to give all, or a sufficient proportion of, his time

[5] The quoted language is that of petitioners' counsel (R. 108).

paper to G. M. A. C. (R. 297–299, 307–308, 327–329, 349, 368, 412, 417–425, 441, 445, 453, 463–464, 498, 504–505, 524–525, 548, 556, 568, 576, 610, 622–624, 669, 688, 701, 702, 715–716, 757, 775, 3464). This was often accomplished by a joint visit of representatives of G. M. A. C. and G. M. S. C. to the dealer (R. 204, 227, 250, 256, 262, 416–417, 530–531, 547, 551–552, 562, 574–575, 606, 607–608, 651, 688, 700–701, 705, 706, 707, 708, Gov't Ex. 176–I, R. 3930, Gov't Ex. 181–K, R. 3984, Gov't Ex. 181–D, R. 3973), at which times the dealer was told that he must use G. M. A. C. facilities or give up his business (Gov't Ex. 176–I, R. 3930, 606, 608, 710–711, 713). Similar pressure was exerted at the contract renewal meetings held annually in each zone or region[6] (R. 209–211, 289–291, 340, 341, 352, 363–364, 365, 413, 460, 515, 534–535, 547, 552, 554, 563, 564, 573, 594, 684, 685, 703, 715–716, 776, Gov't Ex. 52, R. 3453). At such meetings each dealer is required to make satisfactory commitments to representatives of both G. M. S. C. and G. M. A. C. as a condition precedent to continuance of the dealership (R. 209–211, 297, 363–364, 418, 460, 547, 573, 684, 688, 715–716, 722–726, 736–737, Gov't Ex. 118, R. 3575, Gov't Ex. 147, R. 3608).

[6] Since the contracts did not expire annually but continued until terminated (Gov't Exs. 13–14, R. 2769–2770, 2850), the question actually decided was not whether the contracts should be renewed but whether G. M. S. C. should exercise its prerogative of cancelling them.

G. M. A. C.'s approval cannot be obtained until the dealer agrees to give his financing to that company (R. 207–208, 343, 345, 352, 365–366, 413, 547, 552, 563–564, 570, 571, 573, 625, 685, 708, 770, Gov't Ex. 108, R. 3558). Through the interchange of records which G. M. S. C. requires every dealer to file G. M. S. C. and G. M. A. C. are apprised of the proportion of business each dealer gives to G. M. A. C. (R. 225, 249–252, 395, 879–881, 1415, 3881, 3883).

Since every dealer has made a substantial investment in his business, the threat to cancel the franchise is a potent one. The threat in a number of instances has been carried out when a dealer has insisted on his right to finance with whom he pleases (R. 271–272, 304, 307, 308, 327, 363–369, 345, 349, 460–464, 504–505, 525, 548, 568, 576, 595–596, 609–610, 619, 624, 641–642, 654, 683, 718, 746–747, 757). The record also discloses numerous other means employed by petitioners to compel dealers to use G. M. A. C. (R. 257–393, 398–485, 503–514, 522–730, 737–740, 743–777, 797–823, 3916, 4003). New dealers were compelled to agree in advance to let G. M. A. C. do their financing (R. 261–262, 287, 380–381, 528–529, 551, 590–591, 605, 625, 630–631, 650, 653, 667, 681, 685, 703, 751–752). Dealers failing to use G. M. A. C. were shipped more cars or different kinds of cars than had been ordered (R. 263–264, 291–292, 294, 301, 401–408, 415, 619, 669, 767, 768), found

difficulty in obtaining cars promptly when ordered (R. 415, 564, 579, 678–680, 694–695, 708, 709, 763, 765, 775), were refused the use of G. M. A. C. for wholesale purchases if they did not furnish adequate retail business (R. 254–255, 606, 664, 665, 767, Gov't Ex. 176–J, R. 3931–3932),[7] or were deprived of a reserve fund on the books of G. M. A. C.[8] (R. 346, Gov't Ex. 181–H, R. 3980).

That these were the means of carrying out petitioners' program "of making every possible effort" to get dealers to use G. M. A. C. is demonstrated not only by testimony of 48 dealer witnesses (R. 257–393, 398–485, 503–514, 522–730, 737–740, 743–777) but also by the admissions of a number of petitioners' ranking officials (R. 93–193, 198–257, 393–397, 485–503, 514–521, 830–926, 934–976, 976–1018, 1368–1420, 1787–1830), by reports on dealer relationships in petitioners' files (R. 797–823, 3916–4003), and a large amount of other documentary material. Typical illustrations of

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[7] As has been pointed out (*supra*, p. 4), only through the use of G. M. A. C. for wholesale credit could dealers avoid the necessity of having to pay cash for cars before receiving them.

[8] To compensate for the fact that dealers were required to guarantee the paper sold to G. M. A. C., that company added to the regular finance charge a so-called "dealers reserve," to protect the dealer against losses occasioned by repossessions (Gov't Ex. 29, R. 866, 3182). This reserve was greater than the amount actually needed for such purposes, and hence it constituted a profit to the average dealer (R. 968–969, 1010).

the evidence appear in the opinion of the Circuit Court of Appeals (R. 4597–4602), and it is unnecessary to repeat them here.

During the trial, petitioners offered to introduce evidence as to the rates and practices of other finance companies in order to show the "reasonableness" of the G. M. A. C. plan (R. 893–896). Petitioners also indicated that they were prepared to call all of the 15,000 (or 50,000)[9] dealers not called by the Government to testify that they had not been discriminated against or coerced into using the financing facilities of G. M. A. C. (R. 1180). Both of these lines of testimony were excluded by the trial court as irrelevant (R. 893–896, 1179–1182).

The trial court charged the jury that although it was perfectly proper for petitioners to select their own dealers, determine the terms upon which they would sell, and attempt to persuade dealers to accept those terms, they could not apply duress to the dealers or use something within their power "as a club to coerce" them (R. 1938–1939). The court further charged that the ultimate questions in the case were (1) whether coercion had been proved, and (2) if so, whether the acts proved had effectuated an unreasonable restraint on interstate commerce in General Motors cars (R. 1940, 1950–

[9] The dealers numbered 15,000 at any one time, but embraced more than 50,000 during the period of the conspiracy (R. 120, 1388). (See Petition, p. 6.)

1951). The jury found the corporate defendants guilty (R. 1955).

On appeal the circuit court of appeals concluded not only that the findings of the jury as to conspiracy and coercion were plainly supported by the evidence, but also that it would have reached the same conclusion from an analysis of the record *de novo* (R. 4604–4605).[10] The court further held that restraints applied to wholesale and retail financing affected the shipment and movement of cars in interstate commerce (R. 4611–4613), and that in view of General Motors power over the fate of the dealers, the tying of financing conditions to the wholesale purchase and retail sale of cars constituted an unreasonable restraint of the commerce of the dealers.

ARGUMENT

I

The petitioners urge (Pet. 16–22) that the writ be granted because of a conflict between the decision below and *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469. There is no similarity between the facts of that case and of this one, and petitioners assert only that some of the general remarks appearing in the *Apex* opinion are inconsistent with the decision below. Petitioners sum-

[10] Petitioners' brief in the circuit court of appeals admitted that there was some direct evidence in the record supporting the charges (G. M. A. C. Brief, p. 69, R. 4592).

marize the *Apex* opinion as holding that to violate the Sherman Act there must be (1) a "restraint of commercial competition", which (2) is intended to or does fix or raise prices or affect supply (Pet. 17). In this case there is a restraint both on the competition of the dealers and of finance companies other than G. M. A. C., so that the first of the above requisites is unquestionably met.

Petitioners' primary argument seems to be that the *Apex* case holds the Sherman Act applicable only to restraints directed at price and supply. This ignores the actual language of this Court's opinion, the subsequent decision in *Fashion Originators Guild* v. *Federal Trade Commission,* 312 U. S. 457, and that the protection of the small dealer is a fundamental objective of the Sherman Act. The *Apex* opinion repeatedly recognizes that the Act applies to "transactions which tended to restrict production, raise prices or *otherwise control the market to the detriment of purchasers or consumers of goods and services*" (310 U. S., at 493),[11] and to any effort or attempt "to monopolize

[11] Again, the opinion declares that the Act applies to "contracts for the *restriction or suppression of competition in the market*" and practices which "take from buyers or consumers the advantages which accrue to them from free competition in the market" as well as agreements affecting price and supply (310 U. S., at 497), and to restraints shown to have or "intended to have an effect upon prices in the market or *otherwise to deprive purchasers or consumers of the advantages which they derive from free competition*" (310 U. S., at 501) [italics supplied].

the supply, control its price or *discriminate between its would-be purchasers"* (310 U. S. at 510, 511, 512) [italics supplied]. And in the *Fashion Guild* case, subsequently decided, this Court squarely held that the regulating of prices and the limiting of production did "not exhaust the types of conduct banned by the Sherman and Clayton Acts" (312 U. S., at 466).

Indeed, the Sherman Act has always been assumed to apply to restraints which discriminate against and obstruct the freedom of trade of individual purchasers or groups of purchasers, even though the general price structure or total supply of a commodity is not affected. References in many Sherman Act opinions to the restriction of supply frequently mean only the supply of the dealer who is oppressed, and not the total amount available to the country at large.[12] In this case petitioners have discriminated against and threatened to curtail the supplies of purchasers who refuse to use G. M. A. C. to the extent desired, and thus have taken from buyers and consumers the advantages which accrue to them from free competition in the market. The decision below holding such practices unlawful

[12] See *Fashion Originators Guild* v. *Federal Trade Commission*, *supra*; *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291; *Montague & Co.* v. *Lowry*, 193 U. S. 38; *Eastern States Retail Lumber Dealers Association* v. *United States*, 234 U. S. 600; *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359; *Paramount Famous Lasky Corp.* v. *United*

thus follows the *Apex* case and can hardly be said to conflict with it.[13]

Nor is petitioners' contention that competition cannot be restrained by a practice applicable only to one's own product supported by the *Apex* case, which deals entirely with another subject. In any event, petitioners' basic assumption conflicts with such cases as *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436 (where the defendants' claims were supported by a patent), *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, and *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, which hold that a manufacturer cannot, by threats to discontinue supplies, force wholesalers and retailers to adhere to fixed resale prices for his products. Imposition of such a condition upon the purchase of one's products does not differ in kind or legal consequence from a re-

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States, 282 U. S. 30; *United States* v. *First National Pictures, Inc.*, 282 U. S. 44; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87; *Loewe* v. *Lawlor*, 208 U. S. 274.

[13] For the same reason the decision does not conflict with *International Ladies' Garment Workers Union* v. *Donnelly Garment Co.*, 119 F. (2d) 892 (C. C. A. 8) or *United States* v. *Gold*, 115 F. (2d) 236 (C. C. A. 2)), each of which merely applies the principles set forth in the *Apex* case to situations in which labor unions are involved. *Albrecht* v. *Kinsella*, 119 F. (2d) 1003 (C. C. A. 7), also relied upon by petitioners as conflicting, is a decision rendered by the court below 20 days after its decision in the case at bar. The case has no bearing upon the instant problem apart from the fact that it contains a quotation from the *Apex* case.

quirement that the purchaser use a particular finance company for its credit transactions.

Petitioners also argue (p. 18) that there can be no conspiracy to restrain trade by persons who are parts of a single economic unit. This proposition is inconsistent with cases holding that a corporation and its own officers can conspire to restrain the trade of others in violation of Section 1 of the Sherman Act. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436; *Patterson* v. *United States,* 222 Fed. 599, 618–619 (C. C. A. 6), certiorari denied 238 U. S. 635. The same is, of course, true of a corporation and its subsidiaries.[14]

II

Petitioners assert that the decision below conflicts with *Great Atlantic & Pacific Tea Company* v. *Cream of Wheat Co.,* 227 Fed. 46 (C. C. A. 2) and *Whitwell* v. *Continental Tobacco Company,* 125 Fed. 454 (C. C. A. 8).

In the *A. & P.* case it was held that it was not a violation of the Sherman Act for the seller of 1% of a commodity to confine its sales exclusively

[14] Petitioners are in no position, and do not appear, to urge that the separate corporate existence of G. M. S. C. and G. M. A. C. be ignored. Although the corporate fiction will be disregarded when necessary to prevent injustice or fraud, a person who for his own benefit sets up a corporation cannot himself ignore it whenever it becomes disadvantageous. *Taylor* v. *Standard Gas Co.,* 306 U. S. 307, 332; *Higgins* v. *Smith,* 308 U. S. 473, 477; *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, 442.

to wholesalers and accordingly to refuse to sell to the A. & P., a chain of retail stores. Since the seller in that case did not and was in no position to impose any coercive restrictions upon the manner in which purchasers of its product should conduct their business after they had obtained it, the case is wholly different from that at bar.

In the *Continental Tobacco* case, the tobacco company, which owned or controlled "most of the valuable and leading brands of plug and chewing tobacco in the United States," forced each purchaser to accept an allotment for each four-month period "much in excess of the amount which he would be able to sell during that time," and at a price "so high" that, if paid, the purchaser could not make a profit (125 Fed., at 456). The company required purchasers "to refrain from dealing in plug chewing tobacco made by independent and competing manufacturers." If they did so refrain, the allotment would be reasonably reduced and a sufficient percentage of the price rebated so as to permit the purchaser to make a profit. This device was obviously intended to give the tobacco company a monopoly of the plug and chewing-tobacco industry. The decision of the Circuit Court of Appeals holding such a scheme to be lawful was rendered in 1903, and is inconsistent with basic principles which have now been long established. See *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436; *United States* v. *American*

Tobacco Co., 221 U. S. 106; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441.

The *A. & P.* case and the *Tobacco* case stand, at most, for the unquestioned proposition that a merchant ordinarily has a right to sell to whom he chooses.[15] See *Federal Trade Commission* v. *Raymond Bros.-Clark Company*, 263 U. S. 565. But this right does not permit the coercive imposition of conditions destructive of competition and free trade by a seller who dominates the market (*supra*, p. 14).

Petitioners' suggestion that they have a right to impose any restrictions they please upon their own commerce overlooks the fact that the commerce restricted by their practices is actually that of the dealers. The record discloses that G. M. A. C. and G. M. S. C. insist that dealer-purchasers pay cash for and obtain title (or a property interest if the finance company retains title as security for its loan) to the cars before shipment at the factory. Thus the coercion exercised by petitioners interferes with the commerce of the dealers and not with their own.

III

Point IV of the petition for certiorari (pp. 24–27) urges the granting of the writ on the ground

[15] This right was recognized by the trial court in its charge to the jury (R. 1938–1939).

that the lower courts have seriously departed from "the accepted and usual course of judicial proceedings." This charge is supported only by the claim that the trial court made two errors in the exclusion of evidence. It is submitted that the trial court's rulings were correct, and that in any event the evidentiary questions raised are not of sufficient importance to warrant review by this Court.

1. The trial court refused to permit the introduction of evidence showing that G. M. A. C. finance charges were lower than those of other finance companies, and that the object of the plan to further G. M. A. C. was to protect dealers against harmful merchandising practices.[16] Petitioners' argument seems to be that prices were not fixed or affected by the conspiracy charged, and hence the Court was required to enter into a study of the reasonableness of the restraint from a general economic viewpoint.

The same point was made and rejected in *Fashion Originators Guild* v. *Federal Trade Commission, supra.* This Court there upheld the exclusion of evidence as to reasonableness on the

[16] Although petitioners seek to give the impression that they were motivated largely by altruism in imposing upon dealers the "sound" financial policies of G. M. A. C., it may be noted that G. M. A. C. averaged $14,000,000 in profits annually between 1935 and 1938 (R. 3125). An officer of G. M. S. C. stated at a meeting of dealers that "they needed the profits in G. M. A. C., and he was not interested in filling the pockets of independent finance companies" (R. 623).

ground that the evidence as to "the reasonableness of the methods pursued" in a coercive plan which tended toward monopoly "is no more material than would be the reasonableness of the prices fixed by unlawful combination." Petitioners' effort in this case to force dealers to use the chosen finance company would seem clearly to have less justification than the attempt in the *Fashion Guild* case to prevent "style piracy." The Sherman Act is violated by any scheme of the person or person in control of a market to force upon independent merchants a particular method of dealing, even though the plan is believed to be and may in fact be economically sound. It is not for "extra-governmental" agencies to attempt to regulate interstate commerce by restricting the freedom of those who do not conform to their views. *Fashion Originators Guild* v. *Federal Trade Commission, supra; Addyston Pipe & Steel Co.* v. *United States,* 175 U. S., 211, 242.

The *Fashion Guild* case also answers petitioners' suggestion that it is important for this Court to decide whether a restriction which might have the effect of lowering prices would be lawful. In that case the Court pointed out that the antitrust laws were designed to protect small businessmen, and that a monopoly or combination which drove small dealers out of business might be unlawful even if it might "temporarily or *even permanently* reduce the price of articles

manufactured or sold." [Italics supplied.] This language is particularly pertinent as applied to the case at bar.

2. The evidence relied upon by the Government to prove the existence of the conspiracy consisted of documentary material, the admissions of petitioners' officers and agents, and testimony largely oral, relating to 75 dealers that they had been discriminated against and coerced by petitioners in an effort to get them to use G. M. A. C. Petitioners then called 84 dealers (R. 1039–1087, 1130–1183, 1214–1243, 1286–1289) and also offered to call substantially all the other 15,000 (if not 50,000)[17] dealers (R. 1180, 4617) who might have been restrained. The offer was not to show that the dealers testifying as to coercion had not been coerced, but that no coercion had been applied to the additional dealers called.

The latter evidence was excluded on the ground that it would not disprove the existence of an illegal conspiracy. The Government was not required to prove that all, or indeed any, dealers were in fact coerced.[18] Since the offense under the Sherman Act is a conspiracy to coerce and not coercion, the charge could have been proved with-

[17] See Petition, p. 6.

[18] Once petitioners' policy was established and had become familiar to the trade, it would influence dealers without the necessity of enforcement. Mere knowledge of petitioners' attitude and means of controlling dealers would persuade the latter not to risk forfeiting their franchises. Cf. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 453.

out showing that any actual coercion occurred. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225. And a conspiracy to coerce even a small number of dealers would in itself have been illegal. "* * * it is the nature of the restraint and its effect on interstate commerce and not the amount of the commerce which are the tests of violation. See *United States* v. *Socony-Vacuum Oil Co., ante,* p. 224, note 59. Cf. *Labor Board* v. *Fainblatt,* 306 U. S. 601, 606." *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 485. The statements of many dealers that they had not been coerced would not have refuted the testimony of those who said they had been, and thus would not have disproved the existence of an illegal conspiracy (see opinion below, R. 4617–4619).[19] Finally, when an offer is made to call hundreds and perhaps thousands of witnesses whose testimony would have, if any, only slight probative value, the trial court must be vested with some discretionary power to see that the trial does not go on forever. See *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150, 230.

CONCLUSION

The decision below does no more than apply established principles to the facts before the court.

[19] In this respect the present case differs from *Worthington* v. *United States*, 64 F. (2d) 936 (C. C. A. 7), relied on by petitioners. The Circuit Court of Appeals had no difficulty in distinguishing its own prior decision, written by Judge Evans, who also participated in the decision of the present case (R. 4619).

It does not conflict with any decision of this Court or any circuit court of appeals; on the contrary, under the precedents no other decision could have been reached. The decision of the District Court has already been reviewed in the exhaustive opinion of the Circuit Court of Appeals, and the complete and thoroughly sound analysis of the questions presented in that opinion makes unnecessary a second consideration of the issues here. For these reasons the petition for certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

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No. 352

GENERAL MOTORS CORPORATION; GENERAL MOTORS SALES CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

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